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Legislative Responses to Terrorism: A View from Britain

Geoffrey Bennett*

I. Introduction

There is nothing new in the United Kingdom about either the threat of terrorism or a legal response to it. For almost one hundred and fifty years the troubled spectre of Irish politics has haunted mainland Britain and produced a variety of reactions, some worth noting and others richly deserving oblivion. In surveying the legislation it is important to bear in mind that the events of September 11, 2001 did not immediately bring about any dramatic change in the legislation directed to anti-terrorism. Most of it was already there. Having said that, the events of 9/11 have certainly had an impact, including one statute, the Anti-terrorism, Crime and Security Act 2001, that was passed as a direct response. The end result is that Britain has perhaps the most comprehensive legal framework to combat terrorism of any country in Europe.

Even a superficial survey of such a vast legal edifice would be a major undertaking. The more modest aim of this article is to comment on some of the themes and developments that may be of interest, or just seem curious, in the American context. The United Kingdom's experience provides a rich source of material both of what might usefully be turned to advantage elsewhere as well as providing object lessons in what is best avoided.

II. The Historical Background.

A. *Victorian Values*

Particular legal measures relating to Ireland go back some two hundred years but the modern law of legal measures against terrorism undoubtedly begins with Fenian¹ agitation on the mainland of Britain

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1. The name "Fenian" is derived from the legendary warriors of pre-Christian

from the 1860s. The start of systematic bombing campaigns in support of Irish aspirations can be traced back to December 13, 1867.² On that date, three people were observed wheeling a large beer cask packed with 548 pounds of gunpowder and placing it next to the wall of Clerkenwell prison. Their intention was to free two Fenian activists held in the prison. In fact, the authorities had already been tipped off, the prisoners moved and the bomb-makers were under surveillance. The extent of their professionalism can be gauged from the fact that they had apparently forgotten to bring anything to light the fuse and had to obtain a match from one of the children in the street. The resulting explosion blew a hole in the prison wall but also demolished the tenements on the other side of the street. Had the prisoners whom were intended to be freed been standing on the other side of the wall, as arranged, they would almost certainly have been killed. More importantly, six people were killed in the immediate aftermath of the explosion and some forty others injured.

This all but forgotten incident appears to have had an enormous and far-reaching impact in England. There is, therefore, nothing new in terrorist activity creating a degree of reaction that is, in retrospect, arguably out of proportion to any real risk. The then Prime Minister, Benjamin Disraeli, had already banned all political demonstrations in London to put a stop to political meetings in support of the Fenians. After the explosion he advocated the repeal of habeas corpus. Sir Richard Mayne, the Metropolitan Police Commissioner, declared in the *Pall Mall Gazette* that there were 10,000 armed Fenians in London.³ Some 50,000 special constables were sworn in to deal with the perceived threat to public utilities such as gas works and public buildings. Four teams of police employed sewer workers to search the sewers under government buildings. Government offices had floors covered with sand to guard against the use of an attack by "Fenian Fire." Queen Victoria stated that she was grieved "to see the failure of the evidence against all but one of the Clerkenwell criminals . . . it seems dreadful for these people to escape . . . one begins to wish that these Fenians would be

Ireland, the Fianna. The name was selected as the embodiment of Irish nationalism in the nineteenth century. The political roots of Fenianism developed from the failed uprising of United Irishmen in 1798. The modern Irish Republican Army (the IRA) is the direct descendant of this movement.

2. A detailed account of the action can be found in *Criminal Islington*, Islington Archaeology and History Society (London 1989), 21-25.

3. It is completely unclear how he arrived at this figure. The magazine is perhaps now best remembered by lawyers for being the publication containing the advertisement for bogus patent medicine which led to the case of *Carlill v. Carbolic Smoke Ball Co.* 2 Q.B. 484 (1892).

lynch-lawed on the spot. What is to be done about Barrett?"⁴ What was done was that Michael Barrett was hanged on May 26, 1868 outside Newgate prison in front of a crowd of some two thousand people. The convenience of attending this medieval spectacle was enhanced by way of those attending being able to make use of the newly opened underground railway system.⁵

The political ramifications of a terrorist act were even then discussed in terms that people would recognize today. Karl Marx noted: "The London masses, who have shown great sympathy towards Ireland, will be made wild and driven into the arms of a reactionary government. One cannot expect the London proletarians to allow themselves to be blown up in honour of Fenian emissaries."⁶

Of course not everyone was willing to accept the government's line on the outrage even then. On May 27, 1868, *Reynolds News* commented: "Millions will continue to doubt that a guilty man has been hanged at all, and the future historian of the Fenian panic may declare that Michael Barrett was sacrificed to the exigencies of the police, and the vindication of the good Tory principle, that there is nothing like blood."⁷

An event that was so widely reviled nevertheless had political consequences that were more complex. Almost certainly it raised public consciousness of what became known as the "Irish Question." William Gladstone, then in opposition but subsequently prime minister, later claimed that it was the Fenian action at Clerkenwell that turned his mind towards Home Rule.⁸

Fenian agitation continued with a bombing campaign in 1883 that formed a background to an early anti-terrorist statute, the Explosive Substances Act 1885. Nevertheless, leaving aside the legislative measures to combat subversion in two world wars, legislation in the twentieth century was undoubtedly driven by the situation in Northern Ireland from 1969 onwards.

B. The Troubles

From 1966 until 1999 over 3,600 deaths occurred in Northern

4. See *supra* note 2 at 25.

5. It seems quite possible that Barrett was in fact innocent. See www.irishdemocrat.co.uk/features/michael-barrett/print.html (last visited October 28, 2004). One lasting legacy of the incident was that the case of *R v. Desmond, Barrett* 11 Cox 146 (1868) became, until the mid 1970s, a leading case on the issue of so-called oblique intent and conspiracy in the law of murder.

6. See *supra* note 5, at 3.

7. *Id.* at 4.

8. *Id.*

Ireland related to political violence.⁹ It was inevitable that there would be a legislative response that culminated in the Northern Ireland (Emergency Provisions) Acts 1973 to 1998. In the same period, the equivalent number of fatalities on the mainland of Great Britain were 121.¹⁰ The consequence was a series of Prevention of Terrorism (Temporary Provisions) Acts from 1974 onwards. As the title suggests, these Acts were intended to be temporary and so required constant re-enactment. A detailed examination of this legislation is not undertaken because much of it has been repealed and placed in permanent form by the Terrorism Act 2000. There are, however, a number of provisions enacted between 1969 and the 2000 Act that may be worth considering because they serve as object lessons in what to avoid.

C. Two New Departures and a Lost Opportunity?

1. The Northern Ireland Broadcasting Ban

At times of perceived national emergency there is always the risk that the legally unthinkable is thought. An instructive lesson in what to avoid is arguably provided by the Northern Ireland broadcasting ban.¹¹ The measure involved the Home Secretary issuing orders, as he was empowered to do under statute, prohibiting Britain's then two broadcasting networks from airing any words spoken by a person who was a member of a restricted organization, or who solicited or invited support for a restricted organization. The list of restricted organizations included the IRA, the Ulster Freedom Fighters (UFF), Sinn Fein and the Ulster Defence Association.

The then Government offered two justifications for the Ban, the first of which has a contemporary resonance in the light of recent reporting from the Middle East. The then Home Secretary Douglas Hurd, explaining the ban, noted:

When you had a bomb outrage, and there are pictures of bodies to distressed and weeping relatives, and the next thing that happens on the screen in people's living rooms, is somebody saying, "I support the armed struggle" or "they deserved it"—that I think is not only offensive, but it's wrong and it's perfectly reasonable to remove

9. MCKITTRICK, ET. AL., *LOST LIVES*, (Mainstream, Edinburgh, 1999).

10. Home Office and Northern Ireland Office, *Legislation against Terrorism*, Cm. 4178, ¶ 2.2 (London, 1998).

11. An examination of the issue, with comparison to United States Law, can be found in Weaver & Bennett, *The Northern Ireland Broadcasting Ban: Some Reflections on Judicial Review*, 22 VAND. J. OF TRANSNAT'L L. 1119-1160 (1989).

that.¹²

A second reason, advanced some weeks later was that the Government wanted to deprive the restricted speakers of "stature." It believed that those who speak on radio or television gained an aura of authority by so doing. This then increased the "ripple of fear" across the community.¹³ In the light of later clarification by the Home Office, the result was that broadcasters could quote verbatim from statements so long as they did not show the statements actually being made. It meant that broadcasters could show a picture of a person and provide a summary of what had been said.

Although the Supreme Court has not, so far, been called upon to decide such a case, such a ban could obviously be challenged under United States law as an unconstitutional infringement of the rights of freedom of speech and the press under the first amendment to the United States Constitution.¹⁴ Whilst there is no directly comparable provision in the United Kingdom, a group of journalists did bring an action in a British court seeking to attack the order as unlawful under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950,¹⁵ and failed.¹⁶

One can speculate that because this decision pre-dates the United Kingdom's adoption of the European Convention of Human Rights into domestic law by the Human Rights Act 1998, a court might now take a more generous view of the application. The jurisprudence from Strasbourg to date, however, hardly supports this view. Indeed, Section 12(3) of the Terrorism Act 2000 contains an offense of addressing a meeting with the purpose of encouraging support for a proscribed organization or to further its activities. A "meeting" for this purpose means a gathering of three or more persons, whether or not the public is admitted. Upon conviction, the maximum penalty is imprisonment for a term up to ten years. The clear intention is to remove from public debate any statement by an individual on behalf of a proscribed organization. As one commentator has noted, "this stark aim does not quite reach the realms of the broadcasting ban imposed in 1988 . . . but there is certainly a whiff of denying the oxygen of publicity."¹⁷ This is particularly revealing in view of the fact that the 2000 Act was carefully monitored

12. INT'L HERALD TRIBUNE, Oct. 20, 1988, at 2.

13. 139 PARL. DEB. H.C. (6th ser.) 1082 (1988).

14. U.S. Const. art. I. amend. 1.

15. 213 U.N.T.S. 221 (1955) [hereinafter, *The European Convention*].

16. See *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696.

17. CLIVE WALKER, *BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION* (Oxford 2002).

before enactment for compliance with the terms of the European Convention.

Quite apart from any issue of legal review, the arguments advanced by the then-Government to support the Ban are difficult to sustain in a liberal democracy. The claim that media interviews give an appearance of authority to the speaker, and that restricted organizations have used this status to heighten the fear associated with terrorism, failed to take account of the fact that many of the organizations were otherwise legal with democratically elected officials. Why should such officials not be able to use the media to speak out on issues that may be unrelated to terrorism? One view is that this was more about the Government controlling public opinion relating to Northern Ireland rather than limiting fear. The justification that some restricted groups made offensive statements also sounds strange to anyone concerned with democratic political debate. Surely statements that really are perceived as offensive are likely to have an adverse effect on public opinion. If the public perceives them as legitimate political debate, what right has a government to squelch dissent?

With a fitting sense of anti-climax the Ban was quietly withdrawn in 1994. The reason for its demise seems to have had less to do with principle than with a belated recognition that it was pointless. The perception was arguably accelerated by the decision of television networks simply to dub interviews of members of restricted organizations with the voice of someone from the same regional background as the speaker. To a member of the public not personally acquainted with the speaker the difference between the dubbed voice and the actual voice of the interviewee was presumably a matter of complete indifference. The only surprising thing about this ruse is that it was devised so late in the history of the Ban. If anti-terrorism measures are passed then they surely require to both command public support and be effective in attaining a legitimate object. The verdict of the then-shadow Home Secretary, Roy Hattersly, on the Ban was that it had had a damaging effect at home and abroad, particularly in the United States, and had handed a propaganda coup to the IRA.

2. The Right to Silence

One problem encountered already in the United Kingdom is that of applying laws originally fashioned with the narrow focus of terrorism in mind. A less than happy example is presented by the curtailment of the right to silence originally developed in Northern Ireland in 1988 by the

passage of legislation.¹⁸ The move was prompted by the perceived need to deal with two particular types of suspect who refused to answer questions whilst in police custody, namely terrorist suspects and those suspected of handling money from paramilitary activity. In fact, the measure was, as passed, applicable to all criminal suspects in Northern Ireland. Article 3 of the Order permitted a court to draw inferences from the failure of an accused to mention any fact later relied on in his defence when questioned by the police. Article 4 dealt with the accused's failure to testify at trial, enabling a court or jury to draw such inferences from an accused's failure to testify as appear proper. What made this power novel was that the prosecution, as well as the judge, was empowered to comment on the accused's silence at trial. Article 5 permitted a court or jury to draw inferences from the failure or refusal of an accused to account for the presence of objects, substances or marks on his person at the time of his arrest when a constable reasonably believes these are attributable to his participation in an offense. Article 6 allowed inferences to be drawn when a person failed to account for his presence in a place when an offense for which he has been arrested has been committed.

These measures were, even by the standards of the time, a significant departure from the traditional view of a defendant's rights. Quite what their effect was on the prosecution of terrorist offenses is not entirely clear, but it seems unlikely that their impact greatly benefited the prosecuting authorities.¹⁹ This may have been bad, but arguably worse was to come. In 1994 the then-Conservative government enacted Sections 34-37 of the Criminal Justice and Public Order Act 1994. This enacted the substance of what was originally conceived as a response to terrorist activity in one portion of the United Kingdom and made it applicable to the entire country. The legislation has generated much highly technical case law, particularly in relation to Section 34 of the 1994 Act, which allows the jury to draw inferences from an accused's failure to mention, when interviewed, something he later relies upon in his defence.²⁰

There is a significant body of opinion that Section 34, in particular, is not only unhelpful, it may also be counter-productive. It has led to technical appeals and acquittals, which may mean that it is simply not

18. Criminal Evidence (N.I.) Order, 20 N. Ir. Stat., No. 198 (1988) enacted on Nov. 14, 1988 and effective from Dec. 15, 1988. See also J.D. Jackson, *Curtailling the Right of Silence: Lessons from Northern Ireland*, 1991 CRIM. L. REV. 404 (critically reviewing this innovation).

19. See *id.*

20. See Geoffrey Bennett, *Wrongful Conviction, Lawyer Incompetence and English Law—Some Recent Themes*, 42 BRANDEIS L. J. 189, 196-200 (2004).

cost-effective. It can perhaps be explained as a not entirely irrational or unreasonable idea but one that failed adequately to take account of how police interrogation actually operates and how judges respond to radical curtailment of basic procedural principles.

A different aspect of the right to silence, as it affects the public generally, is the re-introduction of the offense of withholding information brought about by Section 117 of the Anti-terrorism, Crime and Security Act 2001. This is despite the fact that one of the supposed reforms introduced by the Terrorism Act 2000 was the abandonment of the nearly identical offense in Section 18 of the Prevention of Terrorism (Temporary Provisions) Act 1989. The only significant difference between the old and new offenses is that, whilst the former was confined to acts of terrorism in Northern Ireland, the latter has no geographical limitation. It is a reversion directly attributable to the changed climate of opinion after September 11. The decision is also striking since there had always been a strong current of doubt about the need or value of such a provision and at least two government-sponsored considerations of the legislation had already recommended its repeal.²¹

Under Section 38B(2) of the (amended) Terrorist Act 2000, a person commits an offense if he does not disclose information, as soon as reasonably practicable, which he knows or believes might be of material assistance in preventing an act of terrorism or securing the apprehension, prosecution or conviction of another person for an offense involving terrorism. Section 38B(4) provides a defence that a person had "a reasonable excuse for not making the disclosure."²²

Clearly the operation of this offense will be greatly influenced by the way in which the courts interpret the ambit of "reasonable excuse." It seems to anticipate that the threshold must be lower than that required for a defence of duress and so would take into account fears of intimidation or reprisal. Nevertheless, the Home Office Circular is uncompromising in stating that, "having a legal or familial relationship with someone does not constitute immunity from the obligation to disclose information as defined in subsection (1)."²³ A spouse is not therefore necessarily insulated from the obligation to inform on their

21. See PAUL WILKINSON & LLOYD OF BERWICK, *INQUIRY INTO LEGISLATION AGAINST TERRORISM* (The Stationery Office Books 1996); see also Great Britain Home Office and Northern Ireland Office, *Legislation Against Terrorism: A Consultation Paper* (1998), available at <http://www.archive.official-documents.co.uk/=document/cm41/4178/contents.htm> (last visited Mar. 9, 2005).

22. For a detailed discussion of the section, see WALKER, *supra* note 17, at 108-116.

23. Organized Crime, Drugs and International Group, *Guidance for the Police and Public on the Implementation of Section 89; Sections 113 -115; Sections 117- 120 and Section 121 of the Anti-Terrorism Crime and Security Act 2001*, Home Office Circular, July 2002, *supra* note 21, at 5.

partner.

What of legal professional privilege? The Act is unhelpfully silent on the matter, but one attractive view²⁴ is that, by analogy with the Common Law offense of misprision of treason, a lawyer would be protected.²⁵ A further difficulty is whether the privilege against self-incrimination provides a reasonable excuse for silence. At first sight the matter appears to be dealt with by the limitation in section 117 of the 2001 Act that the information must relate to "another person." This does not, however, solve the problem that a person's information might inextricably implicate both himself and another person in such a way that the self-damning elements cannot be severed. Whilst there is authority on the issue arising from the former Section 18 offense, the new Act fails to give any indication on the issue.

A further troubling aspect of the Section 38B offense is its relationship with Section 34 of Criminal Justice and Public Order Act 1994.²⁶ A subject who remains silent under questioning, when he knows of another's terrorist wrongdoing, may commit an offense, but his silence may also activate the inferences under the 1994 Act. As one commentator puts it, "... silence could be damning twice over: it forms the *actus reus* of Section 38B and then leads to the adverse inference that the person has suppressed relevant information and is guilty of the offence. Thus Section 38B can pull itself up by its own boot straps with the aid of the other legislation."²⁷

The real question regarding the new offense of withholding information is of course whether such a measure is desirable or serves any useful purpose. In the mainland of Great Britain between 1984 and 1999 there was only one finding of guilt under the former Section 18 offense.²⁸ This alone may suggest that the offense is of limited utility. Assessment of this observation in turn raises the issue of its purpose. The main objective appears to be that it is helpful to create a climate in which providing information is considered a proper and desirable thing to do. The difficulty is surely that hardened terrorists are not likely to quake at the thought of a Section 38B prosecution, and those involved to a petty degree would hardly seem worth prosecuting. They could, perhaps, more usefully be kept under surveillance. Given, moreover, the desirable aim of policing by consent even, and perhaps particularly, in

24. WALKER, *supra* note 17, at 100.

25. Unfortunately, much turns on dicta of the House of Lords in *Sykes v. Director of Public Prosecutions* AC 528 (1962).

26. *Id.*

27. WALKER, *supra* note 17, at 113.

28. However, the charge was brought more often in Northern Ireland. There were 58 charges between 1974 and September 2000. *Id.* at 114.

the case of terrorist offenses, it might be thought that its effect could just as easily be to alienate certain sections of society. As one Member of Parliament noted of the old Section 16 offense, it created the sort of "informers' society, which exists in totalitarian states."²⁹

There is a counter view, which clearly appealed to the present government, that "misprision" offenses are found³⁰ elsewhere and that the threats posed by terrorism are so acute that exceptional measures of this sort are justified. Even, however, if one accepts this argument, the present drafting of the Section 38B is seriously defective. In addition to the points already made, in its present form it has the potential to have a seriously chilling effect on the media. Journalists, in particular, could easily become ensnared in the toils of the current drafting. It is not at all clear that, for example, safeguarding journalistic sources would rise to the level of "reasonable excuse" under the Act.

It is difficult to resist the conclusion that either the new offense is unnecessary or, if it might sometimes have a role to play, it is seriously in need of refinement. In particular, the doubts surrounding the ambit of the statutory defence are likely to be a source of legal and practical difficulty.

3. Lethal Force

Having arguably tried to do too much in some directions, the recent legislation has missed the opportunity to clarify an important area of the law which is capable of arising in the context, amongst others, of counter-terrorism—namely the use of lethal force.

The entire statutory basis of the law in the United Kingdom consists of Section 3 Criminal Law Act 1967 which simply states:

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected persons or of persons unlawfully at large.

(2) Subsection (1) above shall replace the rules of the Common Law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.³¹

The extraordinary vagueness or, as its adherents might prefer, the "complete open texture" of this position has attracted criticism for over

29. H.C. Debs vol 904 col. 475, Jan. 28, 1976.

30. *E.g.*, misprision of treason, a Common Law misdemeanour; § 6(2) of the Explosive Substances Act 1883; and § 6(1) of the Official Secrets Act 1920.

31. JOHN SMITH, CRIMINAL LAW, 278-87 (Butterworths 10 ed. 2002). Smith provides a helpful account of the provision.

twenty-five years.³² One distinguished commentator early noted: "To answer all questions with the test of reasonableness was an easy solution politically, but as a rule for application by courts it is illusory. Perhaps the most unfortunate area of doubt is in respect of what the police may now do to frustrate serious crimes."³³ The position of all security forces, be they police or military, is the same in this regard.

Perhaps what passes for the clearest authoritative exposition of the provision is Lord Diplock's statement³⁴ that:

The form in which the jury would have to ask themselves the question in a trial for an offence against the person in which this defence was raised . . . would be: are we satisfied that no reasonable man (a) with knowledge of such facts as were known to the accused or reasonably believed by him to exist, (b) in the circumstances and time available to him for reflection, (c) could be of opinion that the prevention of the risk of harm to which others might be exposed if the suspect were allowed to escape justified exposing the suspect to the risk of harm to him that might result from the kind of force that the accused contemplated using.

It may well have been statements such as this that the Criminal Law Revision Committee had in mind when they commented:³⁵ "[s]uch ambiguities and equivocations are useless as a guide, to an eighteen year old 'kid' of modest intelligence in uniform in Northern Ireland or anywhere else. . . ."

These difficulties arise because, since the reasonableness of the force used is now a question of fact for the jury, it is difficult to see what guidance the courts could give in terms specific enough to be of real use to those implementing the law. Even if useful guidance can be given by the case law, its development is, in the nature of case law, somewhat haphazard. As a former serving officer in Northern Ireland graphically commented:³⁶

The stock answer of the lawyer to the complaint that the law is unknown is that a case should be brought, whereupon the courts will declare the law when they decide the case. This is adequate for finer

32. See, e.g., Geoffrey Bennett & Peter Rowe, *A Shot In The Dark—Some Reflections of the Law and Lethal Force*, 131 NEW LAW JOURNAL 991, 992 (Sept. 17, 1981).

33. GLANVILLE LLEWELYN WILLIAMS, TEXTBOOK OF CRIMINAL LAW 444 (1978).

34. In Attorney-General for Northern Ireland's Reference (No. 1 of 1975) [1977] A.C. 105,137.

35. Criminal Law Revision Committee Report, Felonies and Misdemeanours (Report 7 1965, Cmnd. 2659), at 23.

36. ROBIN EVELEGH, PEACE KEEPING IN A DEMOCRATIC SOCIETY: THE LESSONS OF NORTHERN IRELAND 24-25 (C. Hurst & Co. 1978).

points of law (concerning, for example, breathalyser tests in the Home Counties of England), but it does not suffice in the circumstances of civil disorder such as have prevailed for several years in Ulster. This is because, if they are to be answerable to the law, the Security Forces must know in advance what the law is, since their actions may involve killing people. . . . If the Army misunderstands the law, many citizens may be killed, injured or wrongly imprisoned, and many soldiers may lay themselves open to conviction for murder, manslaughter and lesser assaults, while some individual leading case takes the usual year or more to make its way through the full legal process. . . .

To date, most of the difficult cases on the use of force by the servants of the state have come from Northern Ireland. The courts inevitably have had to deal with the acute problems posed by a climate of terrorist violence where a certain measure of self-help is a tempting option. For example, in *Fegan*³⁷ the accused was charged, *inter alia*, under the Explosive Substances Act 1883, Section 4(1) as a result of his possession of a pistol and ammunition. He was a Roman Catholic who had married a Protestant and had been the subject of intimidation. The court held that it was open to the jury to find that the weapon was possessed "for a lawful purpose" under that Act.³⁸ It arguably follows from this case, and others like it, that insofar as possession of such weapons can be considered lawful, their use in the same context as their possession could also be envisaged as being a reasonable use of force. It is surely one thing for the security forces to be issued with lethal weapons, it is another when such weapons can expect use in the hands of untrained civilians. It might be thought to be embracing the worst of both worlds to regard the possession of deadly weapons by civilians as "reasonable" and yet to offer no firm guidelines on the circumstances of their use.

The lack of guidance is also combined with a degree of inflexibility in the law's treatment of excessive force. For example, in *R v. Clegg*³⁹ a soldier on duty in Northern Ireland fired four shots at a car which failed to stop at an army checkpoint. The judge⁴⁰ found that the first three shots had been fired in self-defence of a colleague but that the fourth, which actually killed an occupant of the car, had not. By then the car had passed the soldiers and was already fifty feet down the road. The House

37. *R v. Fegan*, N.I. 80 (1972).

38. *See also R. v. Porte* N. Ir. 198 (1978) (addressing a similar question regarding the possession of firearm without certification).

39. *R v. Clegg*, 1 All E.R. 334 (1995).

40. *Id.* This was a so-called "Diplock Court" consisting of a judge without a jury. The system is unique in the United Kingdom to Northern Ireland.

of Lords upheld a conviction of murder on the grounds that killing by excessive force, even if it was in self-defence, was murder and that only Parliament was empowered to change the law. There is, therefore, an all or nothing quality about the application of Section 3 of the 1967 Act. Either a defendant has a complete defence or, if he uses excessive force, no defence at all.⁴¹ Manslaughter, for example, is not an option. The added element of inflexibility is that, currently at least, the mandatory sentence for murder is a sentence of life imprisonment.⁴²

In the past it might have been said that the failure to deal adequately with the law relating to lethal force was part of a more general failure to develop an effective legal machinery to deal with insurrection and terrorism in a democratic society. The legislation of the last twenty-five years culminating in the Terrorist Act 2000 and the Anti-terrorism, Crime and Security Act 2001 now make that claim impossible. It may be that when the Bloody Sunday Inquiry⁴³ eventually reports it will make recommendations. At the moment the situation is unsatisfactory. It is, moreover, not just a difficulty for those enforcing the law. Those potentially on the receiving end of force are surely entitled to know what risks they are facing, and what harm they may justifiably be exposed to.

III. The Most Recent Legislation on Terrorism

Reference has been made throughout the preceding section to the two major modern statutes relating to terrorism, the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001.⁴⁴ An important quality of the 2000 Act is, of course, that it predates the climate of September 11. In that respect, it has the merit of at least being a considered reaction to, and consolidation of, the last twenty-five years of experience of terrorism in the United Kingdom. It is perhaps surprising that this task was undertaken when it was, when the situation in Northern Ireland had at least improved following the so-called Good Friday Peace

41. Other jurisdictions, such as Australia, have not always taken this view. There is currently a suggestion that this area may be reformed, but there was also talk of reform twenty-five years ago.

42. Sentences for murder are also the subject of a current government review. Most persons sentenced to life imprisonment in the United Kingdom serve a sentence of something like thirteen years. There are only approximately twenty-five prisoners currently serving whole life sentences.

43. The Bloody Sunday Inquiry may well rank as the longest running and most expensive inquiry in British history. It finally drew to a close on November 22, 2004. It is estimated to have cost 155 million pounds, has sat for 434 days and heard 921 oral witnesses. See Michael Horsnell, *Bloody Sunday: 46 Million Words but No Names*, THE TIMES, Nov. 23, 2004, at 29. See also <http://www.bloody-sunday-inquiry.org.uk/> (last visited Jan. 23, 2005).

44. By far the most authoritative and helpful analysis of the legislation, its background and effect, is Professor Clive Walker's work, *supra* note 17.

Agreement. Nevertheless, it can be at least partially explained by the fact that, even now, the situation in Northern Ireland is hardly normalized. In addition, there had quite independently been a growing appreciation of the need to make allowance for international terrorism in the modern world. Another important and pervasive influence in the drafting of the Act was the passing of the Human Rights Act 1998 which incorporated the European Convention on Human Rights into domestic British Law. This meant that the drafters of the Act had the therapeutic consideration of the jurisprudence of the European Court of Human Rights to take account of.

The significant themes of the 2000 Act are proscribed organizations; terrorist property; terrorist investigation; counter-terrorism powers; miscellaneous offenses and certain measures confined to Northern Ireland. The 2001 Act, in contrast, was passed as a direct response to September 11. Parts I and II of the Act essentially amend provisions of the 2000 Act. It does, however, strike out in a new direction in Part III dealing with the freezing of foreign property held by United Kingdom institutions. Most controversial of all, Part IV deals with immigration and asylum matters relating to terrorism.

A key element in the operation of the Acts is the newly expanded and elaborate definition of "terrorism" in Section 1 of the Act.⁴⁵ It is

45. 1. Terrorism: interpretation.

- (1) In this Act 'terrorism' means the use or threat of action where—
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it—
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section—
 - (a) "action" includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United

important to note that Section 1 does not itself create a criminal offense. Instead, it is the trigger to the application of the detailed provisions of the 2000 and 2001 Acts. The obvious difficulty with which the section struggles is to be wide enough to be effective yet not so wide as to take in legitimate protest or political activity.

The selection of topics from such a vast legal machinery⁴⁶ is obviously somewhat arbitrary. One issue, however, is particularly worth raising at this stage since it seems, unlike much of the Act, to have had both immediate practical effect and to have engaged the public interest.

A. Detention Without Trial

Internment without trial had been a feature of legislation in Northern Ireland, although it had not been in force since 1975. It was widely criticized at the time and many are convinced that it made a negative contribution to the politics of Northern Ireland. A member of the Labour Government stated in 1997, "internment is the terrorist's friend."⁴⁷ The revival of detention in Part IV of the 2001 Act was therefore a major reversal of the existing government policy and is the clearest possible example of the new perception of dangerous terrorists following September 11. The choice of the word "detention" rather than "internment" reflects the strict legal position that it is open to a detainee to end his detention at any time by agreeing to leave the United Kingdom. The obvious practical difficulty is that a detainee is unlikely to be able to find a country willing to take him. There is, therefore, a situation in which a person can be held, without trial or the prospect of one, without limit of time. Inevitably, the measure required a derogation from the European Convention.⁴⁸

By virtue of Section 21 of the 2001 Act the Home Secretary can issue a certificate if he reasonably believes that a person's presence in the United Kingdom is a risk to national security and he suspects the person is a terrorist.⁴⁹ The use of the word "suspects" is deliberate in denoting something less than "belief." Once a certificate has been issued this

Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

Terrorism Act, 2000, Part 1, § 1 (Eng.), available at <http://www.hmso.gov.uk/acts/acts2001/20010024.htm>. A particularly helpful discussion of the implications of the new definition can be found in WALKER, *supra* note 17, at 20-30.

46. The 2000 and 2001 Acts are only a part of this legal machinery, as is discussed below.

47. Statement by Adam Ingram, H.C. Debs. Standing Committee 73, Nov. 25, 1997.

48. The Home Secretary made the order, as he was empowered to do under section 14 of the Human Rights Act 1998, on Nov. 11, 2001.

49. For the definition of terrorism, see *supra* note 40.

activates the powers under Sections 22 and 23 of the Act relating to deportation, removal and detention. Those detained under Section 23 are likely to be held in high security prisons. There is an appeal under Section 25, within three months, to the Special Immigration Appeals Commission (SIAC). A review by the SIAC takes place automatically within six months of the issuance of a certificate or if, for example, a detainee applies for a review based upon a change of circumstances. An attempt was made in the passage of what became the 2001 Act to include an additional restriction to prevent any court or tribunal entertaining proceedings from questioning decisions of the SIAC, although this was ultimately abandoned. In fact, under British administrative law such so-called ouster clauses have long been circumvented by the courts, so it is doubtful if this concession made any practical difference.⁵⁰

There is at least one significant restriction on the operation of the detention power. Under Section 29 of the 2001 Act the powers require annual renewal and are in any event to cease to have effect by November 2006. Of course, as was often the case with legislation in the past relating to Northern Ireland, there is nothing to prevent Parliament passing fresh legislation at that time to renew the Home Secretary's powers.

A consequence of the fact that the powers under the Act are predicated upon issues of immigration and nationality is that the measures only apply to foreigners, not British citizens. The upshot is that a dangerous foreign individual is able to leave the country at will, provided he can find a country willing to take him, and an equally dangerous British citizen cannot be detained at all under this Act.

What may turn out to be one of the most significant cases of recent times on civil liberties, concerned with this legislation, has now been decided by the House of Lords. The quite exceptional importance with which the case was regarded is reflected by the fact that, very unusually, a nine-judge panel of the House of Lords heard the case in October and gave its decision in December 2004.⁵¹ The fact that the hearing took

50. A famous example of a court's refusal to be deflected by such a clause is *Anisimic Ltd v. Foreign Compensation Commission*, 1 All E.R. 208 (Eng. H.L.) (1969).

51. The usual number is five out of a total of twelve law lords. There would be grave logistical difficulties in forming another panel if there had to be a rehearing, as happened in *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte No. 2*, 1 All E.R. 577 (Eng. H.L.) (1999). With the possible reform of the judicial committee of the House of Lords into a new Supreme Court, it may be conjectured that the House of Lords is already starting to be influenced by the example of the United States Supreme Court where all members sit on all cases. Certainly the type of significant decision made in this case in relation to human rights appears to herald, as was foreseen, a rather different role for the United Kingdom's highest judicial tribunal. The issues relating to the establishment of a Supreme Court are considered in *Constitutional Innovation: The Creation of a Supreme Court for the United Kingdom*;

place only two months after the Court of Appeal had rendered its judgment also shows a degree of celerity in the legal process that is normally only afforded urgent medical cases.

Although there were a number of points of appeal in the case, *A and others v. Secretary of State for the Home Department*⁵² the most important arguments in the Court of Appeal centered around the sources of the Home Secretary's information in issuing a Section 21 certificate and the extent to which the Minister is required to disclose such information to those representing the applicants. The view taken by the Court of Appeal was that the Home Secretary and his officials were likely to have a great deal of information about the individuals concerned, often hearsay and derived from multiple sources. It was said, in these circumstances, to be impractical to investigate in each case whether information had been derived from torture in contravention of Article 3 of the European Convention. Provided the Secretary of State was acting in good faith, the court was required to recognize his responsibility for national security when assessing the material before him. The idea that there was an exclusionary rule with regard to material which might have been obtained in breach of Article 3 was rejected.

Clearly the court showed considerable deference to the judgment and powers of the Home Secretary in implementing this legislation.⁵³ The rather legalistic basis of the decision could perhaps be said to have been that it was essentially an issue of *vires*. The statute clearly set out the minister's powers and he was acting well within them in refusing to disclose the nature and source of that information.⁵⁴

Domestic, Comparative and International Reflections, 24 LEGAL STUDIES, Issues 1-2 (2004).

52. *A and Others v. Secretary of State for the Home Department*, 2004 All E.R. (D) 62 (Eng. C.A.) (2004).

53. For dicta in an earlier case which reflect a more restrained view of the scope for intervention by the courts, see Lord Hoffman's remarks in *Secretary of State for the Home Department v. Rehman* 3 W.L.R. 877, 62 (2001) 1 All E.R. 122 (Eng. H.L.):

I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be confirmed only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

54. For a critical assessment of the litigation at that point, see Jason M. Schone, *The Rule of Law: A Fundamental Democratic Principle*, NLJ 2004, 1545, Oct. 22, 2004.

The deference shown to the Executive by the Court of Appeal was not repeated by the House of Lords⁵⁵ who, by a 7-2 majority, resoundingly held the detention of the men to be unlawful under the terms of the European Convention. Whatever other technical legal bases there were for the appeal the core submission, as counsel for the applicants made clear, was that it was unacceptable to lock up potentially innocent individuals without trial or without any indication when, if ever, they will be released. The House of Lords clearly appears to have responded to that plea. In the most extensive of the speeches in the House of Lords, Lord Bingham concluded⁵⁶ that Section 23 of the 2001 Act was incompatible with Articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status. The uncompromising approach of the majority is also, for example, reflected in Lord Hoffmann's observation:⁵⁷

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

It might be said that, once the House of Lords had accepted the basic point that it was discriminatory to detain indefinitely non-nationals whilst leaving equally dangerous nationals at liberty, the result was inevitable under any proper construction of the terms of the European Convention. What marks a major difference, however, between the United States and the United Kingdom is that this decision of the House of Lords, unlike a finding of unconstitutionality in the Supreme Court, does not have the effect of, in itself, rendering the legislation invalid. The Human Rights Act 1998 contains a typically British compromise⁵⁸ that has the effect of ultimately preserving Parliamentary sovereignty. When, as in this case, a court makes a declaration that legislation is incompatible with the terms of the European Convention the remedy lies with the appropriate minister. In a less controversial situation one might expect legislation to be swiftly introduced to correct the situation. In this case, at least at the time of writing, the government appears to be

55. *A and Others v. Secretary of State for the Home Department*, UKHL 56 (transcript) (2004), available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm> (last visited Mar. 9, 2005).

56. *Id.* at ¶ 73.

57. *Id.* at ¶ 97.

58. Human Rights Act, 1998, § 4(6) (Eng.).

undecided on how to respond to this unique constitutional embarrassment. The persons detained under the legislation have not so far been released. One early initiative taken by the Home Secretary⁵⁹ was apparently to explore the deportation of those held to North African countries, provided an understanding can be reached with those countries that the deportees will not there be tortured or sentenced to death. Quite how such arrangements could be worked out is not clear and it seems almost certain that such a stratagem would invite legal challenge if such a course is pursued. Perhaps as a result it seems to have been quietly abandoned as a policy.

At the time of writing the latest government response is to introduce a bill that will shortly become the Prevention of Terrorism Act 2005. At its core is the new concept of a civil "control order." Two levels of order are envisaged. A lower-level order would involve suspects facing limitations on their freedom and behavior. The higher category could amount to house arrest. Such orders would be imposed if the Home Secretary has "reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity."⁶⁰ Because the proceedings would be civil the lower "balance of probabilities" standard of proof, rather than "proof beyond reasonable doubt," would be applied. It is ironic, but predictable, that one consequence of the decision of the House of Lords in *A and others v. Secretary of State for the Home Department*,⁶¹ which in many quarters was regarded as a vindication of civil liberties in the United Kingdom, is that the proposed legislation will apply equally to foreign nationals and British citizens.

The proposals have provoked intense debate within Parliament. It seems very likely that a role for the judiciary will be found as part of the compromise to get the bill passed by both the House of Commons and the House of Lords but it is not at the time of writing clear when and at what level they will be involved. One serious criticism of the present legislation is that it does not enable those detained, or their lawyers, to know precisely what is the evidence against them. Currently, security vetted "special advocates" are appointed to test the intelligence evidence but this stops short of allowing them to discuss that information with the detainee. The result is that a person can face detention based on secret intelligence which it may be impossible effectively to counter. It is not clear that under a new Prevention of Terrorism Act the "controlled person" will be any better off. One consequence of this is that there have been a growing number of advocates for allowing wider scope to

59. THE TIMES, Jan. 19, 2005, at 1-2.

60. THE TIMES, Feb. 23, 2005, at 6.

61. *Supra* note 51.

gathering evidence by electronic surveillance so as to make it easier to bring terrorist suspects to court.⁶²

The present House of Lords, at least until the present litigation, has tended to take a relatively conservative approach to arguments based upon the European Convention which, unlike the American Bill of Rights, is still of rather recent vintage. There is also, perhaps inevitably, a tendency in the United Kingdom's effective supreme court to take a line that is sensitive to the political currents of the time. This case, however, does appear, without exaggeration, to usher in an era of judicial involvement in legislative review which would have been unthinkable before the Human Rights Act incorporated the terms of the European Convention into domestic law. As far as the fate of the persons detained is concerned, and the response of the British government to the decision, the legal and political maneuvering appears to have only just begun.⁶³

62. This is, for example, the position of the new Metropolitan Police Commissioner, Sir Ian Blair, and the civil liberties organization Liberty. See Shami Chakrabarti and Megan Addis, *Internment at home*, NLJ 265, Feb. 25, 2005.

63. A concise and topical survey of the entire field of this paper is, Clive Walker, *Terrorism and Criminal Justice: Past, Present and Future*, CRIM. L.R. 311, May 2004.